Supreme Court of the United States

October Term, 1960

No. 96

JOHN M. KOSSICK,

Petitioner,

against

UNITED FRUIT COMPANY,

Respondent.

PETITIONER'S BRIEF

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Petitioner's prayer that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled case was granted on the 27th day of June, 1960.

Questions Presented

1. Whether a state statute[1] is legally sufficient to bar an action for breach of a maritime contract, which but for such state statute, would constitute a valid and meritorious cause of action?

2. Whether the right to maintenance and cure, considered a maritime contract from the time when the "mind of man runneth not to the contrary," changes its nature when the shipowner substitutes in places of its obligations, a promise to pay money on land?

[1] New York Personal Property Law, Section 31, commonly known as Statute of Frauds.

3. Is a shipowner's obligation to provide maintenance and cure terminated the instant a seaman enters a U. S. Marine Hospital for treatment?

4. Is the shipowner-employer, or the United States Government, or both, charged with legal responsibility for surgical malpractice, after a seaman enters a United States Public Health Service Hospital?

Opinion Below

The opinion of the United States District Court for the Southern District of New York, dated September 10, 1958 is reported at 166 F. Supp. 571.

The opinion of the Court of Appeals for the Second Circuit is reported at 275 F. 2d 500.

Jurisdiction of this Court

The judgment of the Court of Appeals was entered on February 23, 1960.

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Statement

The facts are set forth at pages 16, 17, 18 and 19 of the record.

The United States Public Health Service, while treating petitioner for a thyroid condition, gave him a rectal anesthesia with full strength medication, without diluting same as required, which medication resulted in destroying petitioner's tissue. The tissue around the anus was destroyed so badly that he required a colostomy, first on December 22, 1950 on left side of his body, which became infected, requiring a second colostomy on January 26, 1951 on the right side of his body (p. 5).

POINT I

It was error to hold that a seaman's right to maintenance and cure was not a maritime contract or that it ceased being a maritime contract during performance of its conditions ashore.

The Court below stated at page 22 (record):

> "The contract sued on is not a maritime contract, since it was merely a promise to pay money, on land, if the former seamen should suffer injury at the hands of the United States Public Health Service personnel, on land, in the course of medical treatment."

The foregoing constitutes erroneous and radical departure from well established law.

The applicable law was clearly expressed by Judge Learned Hand in the leading case in point, *The Pozan*, 276 Fed. 418, at page 433:

> "Obviously if that contract was maritime enough in its character to base a libel upon it in contract, the injury resulting from the wrongful act on shore was as maritime, because it was the same thing."

It is difficult to comprehend why *The Pozan, supra*, was not recognized as authoritative on February 23, 1960, the date of decision by the Court below, when thereafter and on June 29, 1960, the very same case was cited with approval by the Court of Appeals for the Second Circuit in the case of *Monteiro* v. *Sociedad Maritima San Nicolas, S.A.*, 280 F. 2d 568, at page 571.

The fact that a claim is bottomed on seaman's employment for damages suffered ashore does not render such claim divisible so as to be governed in part by maritime law, and the remainder by State law.

The obligation of a shipowner to provide maintenance and cure is as maritime as navigation itself, is as universal

as civilization, constituting an integral part of all ancient sea codes, adopted by usages of all maritime nations, universally held at all times to constitute part of the expenses of the trade, as well as an important basic benefit, protection and compensation for seamen.

A seaman's right to maintenance and cure is older, by many centuries,[1] than the States of the Union, and no State law is competent to alter or abolish these rights.[2]

The proximate cause which set in motion the series of events leading to petitioner's disability was the failure of the shipowner to meet its maritime obligation to provide prompt, adequate and proper maintenance and cure.

That such obligation is maritime in nature has never been disputed prior to the decision in the Court below in the case at bar.

Since ancient times, as enunciated by the authority of *Cleirac, Jugmens d'Oleron,* Arts. 6 and 7 and notes by Cleirac; *Consolato del Mare,* cc. 182, 187; 2 Park Coll. Mar. 152, up to recent times, a shipowner's obligation for maintenance and cure has always been considered as an integral part of maritime shipping.

The D.S. Cage, Fed. Cas. No. 2,002, 1 Woods, 401.

By maritime law, a seaman falling sick during the voyage is to be cured at the expense of the vessel.

The Happy Return, Fed. Cas. No. 13,697, 1 Pet. Adm. 253 (D. C. Pa. 1799);
The Nimrod, Fed. Cas. No. 10,267, 1 Ware, (9) 1 (D. C. Me. 1822);
The Forest, Fed. Cas. No. 4,936, 1 Ware, (420) 429 (D. C. Me. 1837);

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[1] *Mitchell* v. *Trawler Racer, Inc.*, 80 S. Ct. 926, 929 (footnotes 5, 6), 938 (footnote 5).

[2] See cases cited under Point II of this Brief.

Brunent v. *Taber*, Fed. Cas. No. 2,054, 1 Spr. 243, 18 Law Rep. 685 (D. C. Mass. 1854).

The Supreme Court of the United States has clearly established that the obligation of a shipowner to provide maintenance and cure is a maritime obligation.

Calmer Steamship Corp. v. *Taylor*, 303 U. S. 525, 58 S. Ct. 651;
Aguilar v. *Standard Oil Co. of New Jersey*, 318 U. S. 724, 63 S. Ct. 930;
Farrell v. *United States*, 336 U. S. 511, 69 S. Ct. 707.

POINT II

No State may enact a statute limiting seamen's rights.

A seamen's right to maintenance and cure, being one rooted in federal maritime law, a State may not limit or prejudice the characteristic features of such general maritime law.

Southern Pacific Co. v. *Jensen*, 244 U. S. 216, 37 S. Ct. 529.

All our United States courts have consistently held that it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law or affect rights thus created.

In *Riley* v. *Agwilines, Inc.*, 296 N. Y. 402, 405-6:

> "Since it is beyond the power of the State by legislation or judicial decision to mold or modify the maritime law (Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. ed. 834), we must look to the decisions of the Federal Courts to define the liabilities of shipowners for maritime torts, leaving out of consideration decisions of our own courts or statutes of the State which conflict with the rules of liability established in the Federal Courts."

This rule was adopted in *McFall* v. *Compagnie Maritime* Belge, 304 N. Y. 314,

In *Pope and Talbot Inc.* v. *Hawn*, 346 U. S. 406, 409-410, 74 S. Ct. 202, the Court stated:

> "While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court."

In *Frame* v. *City of New York*, 34 Fed. Supp. 194, defendant moved to dismiss the complaint claiming damages for personal injuries under the Jones Act and also for maintenance and cure on the ground the plaintiff had failed to file with the City of New York the notice of accident and injury, and claim for damages as required by the laws of the State of New York. This motion was summarily rejected by District Judge Bondy and in the course of his opinion he stated: "The Statutory requirements relied upon by the defendant are also inconsistent with the uniform operation of the maritime law in so far as the action for maintenance and cure is concerned." "The local rules respecting municipal liability in tort may be overridden 'by the law of the sea'."

See:

Cox v. *Roth*, 248 U. S. 207, 75 S. Ct. 242.

State legislation may not encroach upon the province of admiralty right if it contravenes essential purposes expressed by act of Congress or custom having the effect of law. Uniformity of characteristic features of general maritime law are not subject to variation of applicability in different States which would thus become prejudicial to universally recognized ancient seamen's rights.

> "(4) It is true that local legislation may not encroach upon the province of admiralty law 'if it

contravenes the essential purpose expressed by an act of Congress, or works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law.' Southern Pacific Co. v. Jensen, 244 U. S. 205, 216, 37 S. Ct. 524, 529, 61 L. Ed. 1086. Under this principle courts have frequently declined to enforce state statutes affecting maritime rights, Knickerbocker Ice Co. v. Stewart, 253 U. S. 149, 40 S. Ct. 438, 64 L. Ed. 834; Chelentis v. Luckenbach S.S. Co., 247 U. S. 372, 38 S. Ct. 501, 62 L. Ed. 1171; Union Fish Co. v. Erickson, 248 U. S. 308, 39 S. Ct. 112, 63 L. Ed. 261; Garrett v. Moore-McCormack Co., Inc., 317 U. S. 239, 63 S. Ct. 246, 87 L. Ed. 239, and have also refused to apply local law governing municipalities which conflicted with the maritime law. Workman v. New York City, 179 U. S. 552, 21 S. Ct. 212, 45 L. Ed. 314; U. S. v. Port of Portland, 9 Cir., 300 F. 724; Frame v. City of New York, D. C., 34 F. Supp. 194; Petition of Highlands Nav. Corp., 2 Cir., 29 F. 2d 37."

Sorenson v. *City of New York*, 99 F. Supp. 411, 415-416, affirmed 202 F. 2d 857, cert. denied, 74 S. Ct. 674, 347 U. S. 951.

See also:

Romero v. *International Terminal Operating Co.*, 358 U. S. 354, 384; 79 S. Ct. 468, 486.

Judge Leibell, in the case of *Northern Star S.S. Co.* v. *Kansas Milling Co.*, 75 F. Supp. 534, stated as follows at page 536:

"5-6 The fact that a contract is not in writing does not bar a suit thereon in admiralty. American Hawaiian S.S. Co. v. Willfuehr, D. C. Md. 1921, 274 F. 214, affirmed United States Fidelity & Guaranty Co. v. American-Hawaiian S.S. Co., 4 Cir., 1922, 280 F. 1023. A state Statute of Frauds is inapplicable to maritime contracts. In Union Fish Company v. Erickson, 248 U. S. 308, at page 314, 39 S. Ct. 112, 113, 63 L. Ed. 261, Mr. Justice Day stated the reason for

> the rule as follows: 'If one state may declare such contracts void for one reason, another may do likewise for another. Thus the local law of a state may deprive one of relief in a case brought in a court of admiralty of the United States upon a maritime contract, and the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rule of the states'."

The learned Court below, while it did "assume" that the holding in *Union Fish Company* v. *Erickson*, 235 F. 385, for the Ninth Circuit, affirmed 248 U. S. 308, 39 S. Ct. 112, was still the law, then by labelling the ancient maritime obligation as "not a maritime contract, since it was merely a promise to pay money on land * * *," in effect overruled said decision and destroyed the effect thereof.

In the case of *Garrett* v. *Moore-McCormack Co.*, 317 U. S. 239, 63 S. Ct. 246, the Supreme Court reiterated the fact that law applicable on actions for maintenance and cure must be liberally construed and reaffirms the views expressed by Mr. Justice Story in the case of *Harden* v. *Gordon*, 11 Fed. Cas. at pages 480, 485, No. 6,047.

The Court below was in error in drawing a distinction involving the question of a seaman's right to maintenance and cure on the basis of whether the contract was made ashore or aboard ship.

In the case of *Pope & Talbot Inc.* v. *Hawn*, *supra*, fortuitous circumstances of time and place have been held to constitute no basis for differentiation of substantive rights.

Looking back when England first granted a "patent" to the Lord High Admiral as President of the High Court of Admiralty to deal with "all causes, civil and maritime, also all contracts * * *", specific authority included matters "in, upon, or by the sea * * *" "or upon any of the shores or banks adjacent from any of the first bridges toward the sea through England and Ireland and the dominion thereof, or elsewhere beyond the seas."

Maintenance and cure, being an obligation of a maritime contract of employment, is not subject to change of substantive rights on the basis that the contract was made ashore rather than on shipboard. *Pope & Talbot Inc.* v. *Hawn, supra.*

POINT III

A seaman is entitled to the maximum benefit of treatment for illness or injury arising during employment.

The law is well settled that a seaman is entitled to maintenance and cure during his illness, at the expense of his employer until the seaman has received the maximum benefit of cure and treatment.

Aguilar v. *Standard Oil Co. of New Jersey, supra;*
Cortes v. *Baltimore Insular Line*, 287 U. S. 367, 53 S. Ct. 172;
Calmar Steamship Corp. v. *Taylor, supra;*
Farrell v. *United States, supra.*

The time proven effect of the obligation for maintenance and cure, is expressed by Judge Cardozo in *Cortes* v. *Baltimore Insular Line, supra,* in which case he defines the obligation of maintenance and cure as a maritime contractual obligation of the shipowner in the following language at page 174:

> "A remedy is his also, if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure.' The duty to make such provision is imposed by the law itself as one annexed to the employment. The Osceola, supra.* Contractual it is in the sense that it has its source in a relation which is contractual in origin, but, given the relation, no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has

The Osceola, 189 U. S. 158, 23 S. Ct. 483.

his right of action for the injury thus done to him; the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. The Iroquois, 194 U. S. 240, 24 S. Ct. 640, 48 L. Ed. 955."

POINT IV

The obligation to provide maintenance and cure is the shipowners, until the seaman has received the maximum benefit, not only of hospitalization, but also post-hospital treatment and nursing care.

That the Public Health Service, during said time, has the public duty to treat seamen in nowise absolves or lessens the shipowner of its own continuing duty.

It is true that lower Courts have held that the mere tendering of a hospital certificate to a seaman constitutes full performance of the vessel's obligation regarding cure. *June* v. *Pan-American Petroleum & Transport Co.*, 25 F. 2d 457.

This is in conflict with the holding by the Supreme Court that the duty to provide a seaman with maintenance and cure is imposed by law as annexed to employment. *Cortes* v. *Baltimore Insular Lines, supra.*

The Court below was in error in holding that the obligation to provide proper and adequate treatment terminated before petitioner received the maximum benefit of treatment. Even if there were an admiralty statute similar to the New York State Statute of Frauds, such statute would not be applicable, as the service, having been assumed in part by the Public Health Service, constituted a joint obligation, limited to the extent of the hospital treatment, and did not constitute a delegation or transfer of the shipowner's obligation.

The right to maintenance is a contractual obligation between shipowner and seaman. It is a basic and integral

element of the employment contract. *Farrell* v. *United States, supra; Lindgren* v. *Shepard S.S. Co.*, 108 F. 2d 806.

The interpretation by the Court below is an erroneous application interpretation of the New York Statute of Frauds. The correct interpretation is to be found in the New York State Court decisions, such as *Bulkley* v. *Shaw*, 289 N. Y. 133, at pages 138, 139 (14a):

> "If, as between the promisor and the original debtor, the promisor is bound to pay, the debt is his own and not within the statute. 'Contrariwise if as between them the original debtor still ought to pay, the debt cannot be the promisor's own and he is undertaking to answer for the debt of another.' "

This language recognizes the distinction in the legal obligation here, namely:

> (1) Is it one that the "promisor is bound to pay" in which event it is its own obligation and not within the statute?
>
> OR
>
> (2) Is it one that the original debtor "still ought to pay" which renders the obligation not that of the promisor but one "to answer for the debt, default or miscarriage of another person"?

The fact that there is an assumption of obligation by the Public Health Service merely imposes a partial duty on the hospital similar to that imposed by law on the shipowner to the extent that the hospital renders treatment.

Realistically, it is common knowledge that our marine hospitals are overcrowded, that the doctors and nurses and other personnel of the hospitals are overburdened, that the hospitals are frequently manned by doctors seeking surgical experience, some without any prior practice or hospital training whatsoever, and that seamen, such as the petitioner, aware of these conditions, would rather have doctors of their own choosing.

It is utterly fantastic to assume that an insurance or shipowner's claim agent, seldom if ever a member of the bar, usually the intermediary to whom the seaman applies for maintenance, would ever give a seaman a written commitment regarding his claim. To hold that a seaman must obtain a written agreement under such circumstances is to shut out reality and act on mere legal jugglery, having no basis in law or justice.

The decision of the Court below, in effect, destroys personal liberty and dignity of man, in that a shipowner is vested with dictatorial powers, by means of economic pressure, to coerce a seaman to submit to surgery at the hands of doctors in whom he has no confidence and whose work he fears, irrespective of the fact that the seaman undertakes to obtain a doctor at his own expense.

In the case of *The Osceola*, 189 U. S. 158, 47 L. Ed. 760, 23 S. Ct. 483, back in 1903, the Supreme Court held that an employer could not escape responsibility for any damage caused by inadequate treatment of an ill or injured seaman.

Certainly, the consequences of bad treatment is not assumed by the seaman. *Socony-Vacuum Oil Co.* v. *Smith*, 305 U. S. 424, 59 S. Ct. 262.

The duty to provide maintenance and cure finds its origin in ancient maritime law. It arises out of a personal indenture by which the seaman is bound to his ship and, in return, the vessel is bound to him in maintenance and cure. *Enochasson* v. *Freeport Sulphur* (1925), 7 F. 2d 674.

See also:

Sims v. *United States of America War Shipping Adm'n*, 186 F. 2d 972;
Troy, D. C. W. D. N. Y. 1902, 121 F. 901.

The seaman is not in a position of equal bargaining with the shipowner.

It is, indeed, unrealistic to require a seaman in need of surgery or medication to negotiate and wait for a written commitment from his employer, particularly where his ailment requires prompt attention.

Nothing seems more unfair, unjust and unreasonable than to deny to a seaman the right to enforce his employer's promise on the basis that it was not made in writing.

The law is well settled that one exercising coercive and oppressive acts is responsible for the consequences thereof.

The shipowner unquestionably had the original obligation to provide maintenance and cure. It failed to do so and substituted in place thereof an oral contract. It breached its oral contract.

The Court below has ruled that the shipowner may not be held responsible for the breach of its contract because:

1. It was not in writing.

2. Its obligation to provide proper and adequate cure terminated when the seaman entered a Marine Hospital.

We submit that such holding is contrary to the humanitarian, fair and just action so clearly demonstrated by the Supreme Court in the case of *Bisso* v. *Inland Waterways Corporation*, 75 S. Ct. 629, 349 U. S. 85 as to what constitutes fair bargaining.

The shipowner used economic pressure as the means whereby it destroyed petitioner's freedom of choice as to a surgeon at petitioner's own expense, by refusing to give him maintenance for living expenses unless said seaman capitulated to the wishes of the shipowner, discharge Dr. Frick whom he had retained, and enter a Marine Hospital instead.

The history of the origin, nature and purposes of marine hospitals in the United States is conclusive evidence of the fact that it was never intended that its facilities should provide a substitute for or termination of the shipowner's

obligation to provide maintenance and cure to its sick and injured crew members.

The Public Health Service is the oldest medical service agency in the United States Government and the Division of Hospitals is the oldest segment.

The original Act of 1798 creating the Marine Hospital Service was clearly intended as supplementing the rights of a seaman to treatment for his ills or injuries suffered in maritime service.

It is generally believed that the concept of such service had its origin in the British Isles following the defeat of the Spanish Armada in 1588. The British government then provided for the establishment of a hospital at Greenwich, near London, which was supported, in part, by a deduction of six pence per month from the wages of each seaman.

This service was limited to seamen of the Royal Navy, but in 1696 the benefits of such hospital treatment were made available to merchant seamen.

From 1730, when American seamen (then English subjects) sailed to and from American ports, up to our independence from England, the colonial seamen were granted the same benefits as British seamen.

The fact that the shipowner's obligations were not terminated by the establishment of these Marine Hospitals is further shown by the fact that the States, starting with Virginia and North Carolina, provided for local medical facilities, which were employed when the shipowners failed in their obligations to provide medical care for sick seamen.

On July 16, 1798, President John Adams signed an Act "For the Relief of Sick and Disabled Seamen" (1 Stat. 605), which provided that the master of each vessel pay to the collector of customs "a sum equal to 20¢ a month for each member of the crew".

If further argument were needed to establish the fact that maintenance and cure constituted part of the seaman's earnings, such proof is conclusively established by the fact that the 20¢ aforementioned was to be deducted from the wages of the seaman.

Maintenance and cure has since always been part of the seaman's wages.

Further evidence that use of the Marine Hospital Service was not a termination or substitute for the shipowner's obligation to provide maintenance and cure is the fact that the facilities were limited and, therefore, excluded seamen with chronic or incurable conditions and treated only those who could be expected to return to duty in a short period of time, not exceeding four months. This was so until the Act of March 3, 1837 (5 Stat. 187), which appropriated $175,000 for the Marine Hospital Service.

On June 29, 1870, the Marine Hospital Service ended and the Secretary of the Treasury was authorized to appoint a Supervising Surgeon to provide centralized administration as a Bureau of the Treasury Department (16 Stat. 169).

Seamen were required to contribute 40¢ a month out of their wages to avoid the deficiency appropriations which Congress had been making annually since 1841 (except for 1846 and 1854).

Another example that the shipowner was the one charged with the duty of treating the seaman is the fact that the shipowner had to pay 75¢ per diem for his foreign seamen.

Prior to 1879, the Marine Hospital was not available to all seamen, as the regulations then in effect barred employees in the fishing and whaling industries and crew members of pleasure vessels or canal boats. The seamen who were eligible were those who were given such treatment as part of their earnings, by the arrangement whereby the funds were actually paid by the shipowner who credited itself with such payments against the seaman's wages.

In 1884, the hospital tax was abolished (23 Stat. 57). From 1799 to 1884, seamen had contributed out of their wages the sum of $15,794,087.63 as against total expenditures of the Government of $19,622,371.87.

Still, treatment was not given to any seaman, without charge, except those formerly subject to the tax.

In 1902, Congress changed the name from "Marine Hospital Service" to "Public Health and Marine Hospital Service" (32 Stat. 712).

Up to 1905, the shipowner was subject to tonnage tax, but thereafter all branches of the Service were entirely financed by Congressional appropriations (33 Stat. 1217).

On March 3, 1919, Congress authorized the Secretary of the Treasury to provide free hospital services for discharged sick and disabled soldiers, sailors, and marines, Army and Navy nurses, and beneficiaries of the War Risk Insurance Bureau.

On May 1, 1922, by Executive Order, 57 Veterans' Hospitals operated by the Public Health Service were transferred to the new Bureau, but at the same time, the services were greatly extended to include the expansion of research service and other activities and the treatment of incurable diseases.

The shipowner's contractual obligation to provide prompt, adequate and proper treatment never was and still is not met by the limited Public Health Service facilities.

Proof of this fact is demonstrated in the letter from the Federal Security Administrator to the Chairman of the Committee on Interstate Foreign Commerce, outlining the need of increased efficiency and proper distribution of authority.

Public Law 410 was approved, which was a Bill by the 78th Congress "To Consolidate and Revise the Laws Relating to the Public Health Service, and for other Purposes".

Under the new law, the Office of Surgeon General, The National Institute of Health, The Bureau of State Services, and The Bureau of Medical Services and many common administrative and management functions were centralized in the Office of the Surgeon General.

The Department of Health, Education and Welfare created by Reorganization Plan I of 1953, became effective on April 11, 1953, thus abolishing the Federal Security Agency created in 1939, and transferred all functions of the Federal Security Administrator to the Secretary of Health, Education and Welfare.

In 1950, we had 24 hospitals, 18 outpatient clinics and about 100 outpatient offices. In 1959, this figure was reduced to 16 hospitals, but the outpatient clinics increased from 18 to 25, yet the utilization of Public Health Facilities were increased by extending benefits to those in active duty and retired members of the Armed Forces, their dependents and dependents of deceased members of the Armed Forces, after the Act of December 7, 1956.

According to the Division of Hospital Operation Manual, R-8, of January 12, 1960, there is a demand for more equipment, supplies, personnel time, and expert supervision far in excess to that available.

It is obvious from said report that there is a lack of medical generalists and specialists in every field of medicine.

The report further states "The quality of patient care rendered in any hospital has been found to be directly related to the ability of the professional personnel to keep abreast of technical advances."

The report is summarized as follows:

> "*Summary.* The United States Government requires that the Public Health Service Provide medical care to American Merchant Seamen and other designated

beneficiaries. To fulfill this obligation, the Division of Hospitals operates a system of 16 Hospitals. Each hospital, in addition to caring for the patient, should:

—Conduct research to produce new knowledge.

—Conduct extensive training to transmit new medical knowledge into practice.

—Organize its administrative and management functions as efficiently as possible.

Only then can the Public Health Service provide its beneficiaries with medical care of a quality equal to that available in the best non-Government facilities."

The Public Health Service is performing herculean tasks with its limited funds, facilities, personnel and doctors, but it is not adequate for all seamen who need cure and treatment.

A seaman is not on an equal bargaining basis with his employer as to the manner in which a shipowner performs his contractual obligation to provide prompt, adequate and proper medical and surgical aid and attendance.

When the shipowner selects an overworked, undermanned and inadequate facility, employing untrained or inadequately trained personnel (which is common knowledge), simple ordinary justice, as well as well established law, imposes on those having the power to direct (not subject to protest by a seaman) responsibility for the shortcomings of the facility to which the shipowner orders the seaman to attend. *Bisso* v. *Inland Waterways Corporation*, 349 U. S. 85, 75 S. Ct. 629.

Public Health Service Hospitals, formerly called U. S. Marine Hospitals, are owned and operated by the Federal Government. They are fully supported by direct appropriations from Congress. The purposes for which these funds are provided are specified in the language of the annual Appropriation Act ("Hospitals and Medical Care") and in Sections 321 and 322 of the Public Health Service Act, as amended (P. L. 410, 78th Congress—42 U. S. C. 248,

249). The Public Health Service Hospitals are staffed by full time Public Health Service civilian and commissioned personnel. Each hospital is in the charge of a "Medical Officer in Charge" who takes full responsibility for administering his facility within the funds allocated to him and within the framework of law, regulation, and policy of the Federal Government.

POINT V

The Court below erroneously gave consideration to comment by the District Court as to irrelevant matter, not justified by the facts.

The Court below stated (p. 21—Record):

> "As the district judge observed, these allegations were bottomed 'on contract and not on unseaworthiness or the Jones Act'; that this was not an oversight by the plaintiff 'but rather a stratagem to resuscitate a claim time barred under the Jones Act'."

There is no basis for the charge that a stratagem was practiced.

It is true that petitioner waited more than two years before retaining Jacob Rassner as his attorney, and that no direct action could have been maintained against the United States of America based on the Federal Tort Claims Act, having a two year statute of limitations (28 U. S. C. 2401).

There was no unseaworthiness involved and no negligence as contemplated by the provisions of the Jones Act, and therefore no reason for petitioner or his attorney to consider questions of the Jones Act or unseaworthiness, nor for any court to comment thereon as having any part in the consideration of the action.

The action against the employer from its inception was predicated on petitioner's claim as a matter of contractual right for maintenance and cure.

As stated by Judge Medina in the case of *Bartholomew v. Universe Tankships, Inc.*, 279 F. 2d 911:

> "It has long been settled that a seaman is not required to elect between a claim for maintenance and cure and a claim for negligence under the Jones Act. On the contrary, the Supreme Court has held the two rights are 'consistent and cumulative.' Pacific S.S. Co. v. Peterson, 1928, 278 U. S. 130, 49 S. Ct. 75, 77, 73 L. Ed. 220."

The claim predicated on the obligation of maintenance and cure is separate and apart from any claim for negligence or unseaworthiness.

The Supreme Court of the United States in the case of *Braen v. Pfeifer Oil Transportation Co.*, 80 S. Ct. 247, stated at page 250:

> "These two cases * were not brought under the Jones Act but involved maintenance and cure. Yet they make clear that the scope of a seaman's employment or the activities which are related to the furtherance of the vessel are not measured by the standards applied to land-based employment relationships."

Conclusion

1. The obligation to provide maintenance and cure has always been and still is a non-delegable duty on the part of the shipowner, and therefore, even if there were a federal law similar to the New York Statute of Frauds, such Statute would be irrelevant and not applicable, by reason of the relationship and direct obligation of the shipowner to the seaman.

2. Maintenance and cure, including complete and proper medical care, always has been and still is a contractual ob-

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* *Aguilar v. Standard Oil Co., supra.*
Warren v. United States, 340 U. S. 523, 529, 71 S. Ct. 432, 436.

ligation cognizable in admiralty, and is the very essence of maritime law.

3. State law is not competent to alter, limit or abolish substantive rights of seamen to maintenance and cure.

4. The non-delegable duty of a shipowner to provide maintenance and cure is not met by the mere expediency of handing a seaman in need of treatment a "Master's Certificate."

5. A shipowner should not have the right, over the protest of a seaman, to direct a sick or injured seaman to submit his person to surgical or medical treatment at the hands of people in whom he has no confidence, particularly where he has justifiable apprehension of harm based on prior personal experiences. The adequacy of a marine hospital's facilities to treat any seaman presents an issue of fact.

6. A shipowner, having the power of direction as to the mode and manner of treatment, upon exercising such right of decision, in justice and fairness, should be charged with the consequences of its decision and direction.

7. A shipowner who disregards well known facts which are common knowledge, that Marine Hospitals lack adequate and sufficient facilities by reason of their overcrowded and undermanned conditions, and turns a deaf ear to the protests of a seaman voicing prior injurious personal experiences, and directs said seaman to discharge his own physician whom he has retained and submit to a facility so as to save the shipowner expense of treatment, on the promise to indemnify, certainly should not be permitted to escape the effects of disastrous results caused by the negligent acts which reduced the petitioner to his unfortunate plight.

8. Finally, under all of the facts in this matter, seamen generally should not be burdened with the consequences of ill effects, resulting under circumstances where the seaman, without choice, is compelled to and does obey the orders of his employer.

Respectfully submitted,

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